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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 245

SOUTHERN CALIFORNIA FREIGHT LINES, a corporation,
Petitioner,

vs.

CHARLES T. McKEOWN,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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No. .....

SOUTHERN CALIFORNIA FREIGHT LINES, a corporation,
Petitioner,

vs.

CHARLES T. McKEOWN,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

Southern California Freight Lines, a corporation organized and existing under the laws of the State of California, prays that a writ of certiorari issue to review the judgment of the United States Circut Court of Appeals for the Ninth Circuit in the above case entered April 21, 1945, petition for rehearing upon which was denied May 22, 1945. A certified transcript of the record in the case, which was printed under the supervision, direction and control of the Clerk of the Circuit Court of Appeals, including the proceedings and opinion in that court, has been filed by him together with ten copies of the record as printed below.

Statement of the Matter Involved.

(a) History of the Case.

Respondent brought suit in the United States District Court in and for the Southern District of California seeking additional compensation alleged to be due under the provisions of the Fair Labor Standards Act of 1938 (52 Stats. 1060, U. S. Code, Title 29, Sections 201-219), for unpaid overtime compensation, an additional equal amount as liquidated damages, and attorney's fees. The trial court awarded judgment to the respondent in the sum of $879.85, an equal amount as liquidated damages and $150.00 attorney's fees. (52 F. Supp. 331.) [R. 28-30.]

Petitioner appealed to the Circuit Court of Appeals for the Ninth Circuit, which affirmed the decision of the trial court. [R. 48-51.] Petitioner filed a petition for rehearing, which was denied. [R. 53.] Petitioner seeks certiorari to review the decision of the Circuit Court of Appeals.

(b) Statement of the Case.

Petitioner is engaged in the transportation of property by motor vehicle over the public highways in the County of Los Angeles, State of California [R. 26] and served most points in Southern California. [R. 23.] It was stipulated between petitioner and respondent that Southern California Freight Lines is engaged as a common carrier in interstate commerce to the average extent of 7% of its total business. [R. 23.] Respondent was an employee of petitioner. It was further stipulated, and the trial court found pursuant thereto, that respondent in his employment by petitioner was concerned with and

connected with interstate commerce to the extent of 7% of his total activities during each and every day of each and every week during his said employment. [R. 24, 25.] It was admitted before the trial court that the business of petitioner was 93% intrastate and 7% interstate, and that respondent employee engaged in both intrastate and interstate activities but that his interstate activities for each week were 7% of his total activities. [R. 22, 23.]

In the trial court the petitioner contended that the interstate activities of respondent were not "substantial," within the meaning of this court's decision in *Walling v. Jacksonville Paper Company*, 317 U. S. 564, so as to bring him under the coverage of the Fair Labor Standards Act.

Jurisdictional Statement.

The jurisdiction of this Court is invoked under U. S. Code ,Title 28, Section 347(a).

The Question Presented.

Is an employer, whose business is substantially local and not interstate and whose employees' activities are both intrastate and interstate but only 7% of the activities of the employee are interstate, subject to the Fair Labor Standards Act?

Reasons Relied Upon for Allowance of Writ.

(1) The Circuit Court of Appeals has decided an important question of Federal law which has not been but should be settled by this court.

The Fair Labor Standards Act, 29 U. S. C. A., Sections 201 to 219, inclusive, under the provisions of Section 213

thereof excludes certain employments including agriculture, catching fish, seamen, switchboard operators in a small telephone exchange, but did not say what proportion of the employee's time and effort must be given to the excluded activity to effect an exclusion. In only one case does the statute prescribe a rule to govern employment in both intrastate and interstate activities (Section 213 (a) (2).) That section provides that any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce is exempted from the provisions of the act. All employees of carriers by air subject to the provisions of Sections 181 to 188 of Title 45, all employees of streets, suburban or interurban electric railways, or local trolley or motor bus carriers, and all employees of an employer subject to the provisions of Sections 1 to 27 of Title 49, are exempted (includes rails, pipelines and telegraph). The employees of all such employers are engaged in the business of transportation.

In the case of transportation by truck only such employees are exempted as to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 304 of Title 49. This latter section has received an interpretation by this court in the case of *United States v. American Trucking Association,* 310 U. S. 534.

Employees of transportation companies not exempt under Section 213 (b), are subject to the provisions of the Fair Labor Standards Act if they have a substantial

amount of activity in Interstate Commerce. If 93% of the activity of the employee of the transportation company is intrastate or local, and only 7% is interstate, it would appear that Congress did not intend to confer the benefits of the Fair Labor Standards Act on such employees. In the case of retail or service establishments, the Act itself expresses the quantity of intrastate activity to work the exclusion. In the case of *Callus v. 10 East 40th Street Building*, 146 Fed. (2d) 438, decided by the Second Circuit Court of Appeals on December 12, 1944, it was stated in the opinion by Circuit Judge Frank who used this language, p. 440:

> "These tenants occupy about 26% of the rentable area of the building, and about 29% of the rented space. Thus, it may not be necessary to go beyond the activities of these tenants to determine that the maintenance employees are entitled to the benefits of the Act. The Wage and Hour Division has adopted a standard of 20% for determining whether a substantial portion of the building is devoted to production for interstate commerce. Release No. PR-19 (Rev.) (Nov. 19, 1943). Some quantitative standard is necessary. Interpretation of this Act by the Wage and Hour Division, especially when not taking the form of authorized regulations, are not decisive; but we have been admonished that they are 'entitled to great weight.' *United States v. American Trucking Association*, 310 U. S. 534; *Skidmore v. Swift & Co.*, 65 Sup. Ct. 161. The Division's 20% standard seems to us a sensible one for the courts to adopt."

Notwithstanding that it was shown in this case that more than 20% of the activities of the maintenance em-

ployees of the 10 East 40th Street Building were engaged in activities in commerce, this Court on June 11, 1945, reversed the Second Circuit on the ground that Congress did not intend by the enactment of the Fair Labor Standards Act to "absorb by adjudication essentially local activities." It is of course true that this Court considered it material that the office building in which the work was performed was operated for the use of tenants of "unrestricted variety," and must therefore be considered a local business. Applying the provisions of the Fair Labor Standards Act to the foregoing facts, this Court said:

> "To assign the maintenance men of such an office building to the productive process because some proportion of the offices in the building may, for the time being, be offices of manufacturing enterprises is to indulge in an analysis too attenuated for appropriate regard to the regulatory power of the states which Congress saw fit to reserve to them."

In the instant case, the employer operated almost exclusively within the confines of California. Less than 1% of the business of petitioner was transported by it across state lines. [R. 11.] The trial judge found that of its total business in the County of Los Angeles, State of California, 7% of it was in interstate commerce. [R. 26.] There is no finding by the trial judge that petitioner transported any portion across state lines. The facts present a case of a local business being subjected to the requirements of the Fair Labor Standards Act.

In *Walling v. Jacksonville Paper Company*, 317 U. S. 564, this Court said at page 590:

> "we cannot be unmindful that Congress is enacting this statute plainly indicated its purpose to leave local business to the protection of the States."

and in referring to this statement in the *Jacksonville Paper Company* case, *supra*, this Court in *10 East 40th Street Building, Inc. v. Callus, supra*, said:

> "We must be alert, therefore, not to absorb by adjudication essentially local activities that Congress did not see fit to take over by legislation."

The Ninth Circuit, in affirming the United States District Court decision, stated that it agreed with the opinion of the Tenth Circuit in the *New Mexico Public Service Company v. Engel*, 145 Fed. (2d) 636, where the activity of the employee in interstate commerce was only 4%. Petitioner does not believe that this Court meant to announce in *Walling v. Jacksonville Paper Co., supra*, that if the activities of the employee in interstate commerce amount to 4% of his total activities, such employee is covered by the Act. No petition for a writ of certiorari was applied for to review the decision of the Tenth Circuit in the *Engel* case, *supra*. One of the cases relied upon by the Tenth Circuit was *North Shore Corporation v. Barnett*, 153 Fed. (2d) 172, decided by the Fifth Circuit. In this case, North Shore Corporation petitioned this Court for a writ of certiorari, and on October 9, 1944, this Court granted the petition. Thereafter, the case was disposed of pursuant to the stipulation of the parties.

It should be authoritatively determined that an employer such as petitioner, which operates almost exclusively within the boundaries of a single state, whose intrastate activities and interstate activities are intermingled, and the activities of its employees in interstate commerce do not exceed 7%, is a local business which is not covered by the Fair Labor Standards Act.

(2) The Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this Court. The decision of the case at bar is probably in conflict with the holdings of this Court in *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, and in *10 East 40th Street Building, Inc. v. Callus*, decided by this Court on June 11, 1945. In the *Jacksonville Paper Company* case, wherein the activities of the employee were both in interstate and intrastate commerce, this Court held:

> "If a substantial part of an employee's activities related to goods whose movement in the channels of interstate commerce was established . . . he is covered by the Act."

and further stated at page 590 of that case as follows:

> "We cannot be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the States."

In the *10 East 40th Street Building, Inc. v. Callus* case, this Court held:

> "We must be alert, therefore, not to absorb by adjudication essentially local activities that Congress did not see fit to take over by legislation."

The trial judge who heard the case at bar applied the principles applicable to the National Labor Relations Act rather than the Fair Labor Standards Act. [R. 18.] The trial Judge used this language:

> "The courts refusing to apply the Act, emphasize the incidental or casual character of the interstate operation involved. Evincing the disposition of Congress reference to National Labor Relations Act, but also pertinent here, the Supreme Court through Justice Stone declared:

"'Given the other needful conditions, commerce may be affected in the same manner and to the same extent in proportion to its volume, whether it be great or small. Examining the Act in the light of its purpose and of the circumstances in which it must be applied, we can perceive no basis for inferring any intention of Congress to make the operation of the Act depend on any particular volume of commerce affected more than that to which courts would apply the *maximum de minimis*. Labor Board v. Fainblatt, 306 U. S. 601. "The quantity of cement shipped out of a state is not *de minimis* merely because it is but a small percentage of respondent's total sales. . . . Congress could not have intended that it would subject laboring men or employers to such a confusing and, in business competition, destructive anomaly. Nor is the quantity of a particular product shipped out of state *de minimis* merely because it is small in proportion to the total interstate commerce in that produce from all the states or from employer's state." (N. L. R. B. v. Crowell Portland Co. (9th C. C.), 108 F. (2d) 198.'

"The activities of the plaintiff, under the facts, were not casual nor spasmodic, but rather a continuous, regular and integral part of his everyday and every week business, partaking of an interstate character." [R. 19-20.]

It is now determined by the Circuit Court of Appeals for the Ninth Circuit that:

"It is true that employees whose activities merely affect interstate commerce are not within the Fair Labor Standards Act, though within the Wagner Act. However, there seems no logical reason why there should be any difference in the substantiality of the amount of 'affecting of' or being 'in' commerce to bring employment under either act.

"In this connection we have said in National Labor Relations Board v. Cowell Portland Cement Co., 108 F. 2d 198, 201,

" 'The quantity of cement shipped out of state is not *de minimis* merely because it is but a small percentage of respondent's total sales. Otherwise, we would have the anomaly of one plant under federal regulation because exporting its entire product of 14,000 barrels while alongside it another competing plant under state regulation because, though shipping the same amount of 14,000 barrels, they constituted, say, but 4 percent of its product. Congress could not have intended that it would subject laboring men or employers to such a confusing and, in business competition, such a destructive anomaly * * *.'

"We agree with the opinion of the Tenth Circuit in New Mexico Public Service v. Engel, 145 F. 2d 636, that an employee occupied in interstate commerce in an enterprise but four percent of which is interstate and, as here, continuously engaged therein, is substantially engaged in commerce within the meaning of the Act. Appellee here so was substantially engaged." [R. 50-51.]

(3) The Circuit Court of Appeals has rendered a decision in conflict with decisions of other Circuit Courts of Appeal on the same matter. The decision of the Ninth Circuit in the case at bar is in conflict with the decisions of the majority of other circuits on the point at issue.

First Circuit—Court of Appeals: In *Walling v. Silver Bros. Co.*, 136 Fed. (2d) 168, decided May 21, 1943, the First Circuit clearly followed the princi-

ples enunciated in *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, and *Kirchbaum v. Walling*, 316 U. S. 517.

SECOND CIRCUIT—Court of Appeals: In *Fleming v. Arsenal Bldg. Corp.*, 125 Fed. (2d) 278, decided December 30, 1941, and *Callus v. 10 East Fortieth Street Bldg.*, 146 Fed. (2d) 438, decided December 12, 1944, employees were clearly engaged in a substantial amount of interstate activity.

THIRD CIRCUIT—Court of Appeals: In *Fleming v. Kirschbaum*, 124 Fed. (2d) 567, substantially all of the activities of the employees were in interstate commerce. Writ of certiorari was granted in this case, which affirmed the Third Circuit in the case entitled *Kirschbaum v. Walling*, 316 U. S. 517.

FOURTH CIRCUIT—Court of Appeals: *Bracey v. Luray*, 138 Fed. (2d) 8, decided September 16, 1943, and *Davis v. Goodman Lumber Co.*, 133 Fed. (2d) 52, decided February 2, 1943. Both of these cases turned on the fact that a substantial amount of interstate work was performed by the employees.

FIFTH CIRCUIT—Court of Appeals: *Super-Cold Southwest Co. v. McBride*, 124 Fed. (2d) 90, decided December 1, 1941, and *Fleming v. Jacksonville Paper Co.*, 128 Fed. (2d) 395, and *James V. Reuter v. Walling*, 137 Fed. (2d) 315, decided July 22, 1943. All turn on the fact that a substantial amount of activity in interstate commerce was shown by the employees. In this same circuit, the case of *North Shore Corporation v. Barnett*, 143 Fed. (2d) 172, de-

cided June 9, 1944, held to the contrary. This Court granted the writ of certiorari on October 9, 1944.

SIXTH CIRCUIT—Court of Appeals: *Crown Overall Mfg. Co. v. Walling,* decided May 7, 1945, celarly followed the holding of this Court in *Walling v. Jacksonville Paper Co., supra.*

SEVENTH CIRCUIT — Court of Appeals: *Walling v. Goldblatt Bros.*, 128 Fed. (2d) 778, decided June 25, 1942, showed that a substantial amount of activity of employees was in interstate commerce.

EIGHTH CIRCUIT—Court of Appeals: In *Walling v. Mutual Wholesale Food and Supply Co.*, 141 Fed. (2d) 331, decided March 8, 1944, and in *Schwarz v. Witner Grocer Co.*, 141 Fed. (2d) 341, decided March 9, 1944, the cases turned on the fact that the activities of the employees were of a substantial amount in interstate commerce.

NINTH CIRCUIT—Court of Appeals: None of the decisions of this circuit seem to have followed the principles laid down in *Kirschbaum v. Walling, supra,* and *Walling v. Jacksonville Paper Company, supra.* This Court seems to observe very little difference in jurisdiction between the National Labor Relations Act and the Fair Labor Standards Act. This Court seems to have placed greater emphasis upon the applicability of the doctrine of *"de minimis"* than on the doctrine of "substantial activity of the employee in interstate commerce."

TENTH CIRCUIT—Court of Appeals: In *New Mexico Public Service Company v. Engel,* 145 Fed. (2d) 636, decided November 3, 1944, the doctrine of "substantial employee activity" was not applied, but the Court seemed to think that if the doctrine of *"de minimus"* did not apply, the employee was covered by the Fair Labor Standards Act.

Wherefore, petitioner prays that a writ of certiorari be issued to the United States Circuit Court of Appeals for the Ninth Circuit commanding that Court to certify and send to this Court, on the day to be designated, a full and complete transcript of record and proceedings in said Circuit Court of Appeals had in this cause to the end that this cause may be reviewed and determined by this court; that the judgment of the Circuit Court of Appeals be reviewed, and that petitioner be granted such other and further relief as may seem proper.

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